No. 83-2099

Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

ASSOCIATED DRY GOODS CORPORATION,

Petitioner,

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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September 19, 1984

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Petitioner, Associated Dry Goods Corporation ("Associated"), respectively submits a reply brief to respondent's brief in opposition to the petitioner's petition for writ of certiorari and requests that this Court grant the writ or direct the Minnesota Supreme Court to decide the case in accordance with the precedent of this Court. The opinion of the Minnesota Supreme Court is reported at 347 N.W.2d 36 (Minn. 1984).

I.

Where the precedents of this Court are not followed, a substantial federal question exists.

Petitioner requests the issuance of a writ of certiorari because the Minnesota Court has not followed the precedents of this

Court, and in this case such failure presents a substantial federal question.

The Minnesota Court had before it a clear precedent in *F. W. Woolworth Co.* v. *Commissioner of Taxation and Revenue*, 458 U.S. 354 (1982).

Instead it applied *Container Corporation* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983) and *Butler Brothers* v. *McColgan*, 315 U.S. 501 (1942).

The tables contained in petitioner's petition on pages 6-8 demonstrate the striking similarity between the facts of the *Woolworth* situation and the present Associated case and the similarity in facts discloses a similarity in legal principles.

Legal principles underlying facts are more dispositive than the facts themselves and petitioner is not blindly pointing to the similar facts in *Woolworth* without regard to the underlying principles. The underlying principle of *Woolworth* is that the economic realities of a non-integrated horizontal retail business do not provide the essential nexus which permits a state to accomplish the extraordinary extension of its powers to claim income arising out of other states in calculating the tax it endeavors to collect.

The incidents of corporate and organizational unity of Associated which respondent cites and which are summarized on page 9 of the petition are in quantity insignificant compared with the fundamental separateness of Powers, but, more important, are of a quality irrelevant to tax considerations. In their quantitative inadequacy and qualitative irrelevance they do not provide the essential nexus. As this Court stated in *Woolworth*, our cases demand more.

In terms of revenue flows, it may be asked whether it really makes any difference that the factors relied on by the Minnesota Court exist, or for that matter do not exist.

A retail ownership group like Associated operates discrete individual stores in different states with revenue and expense patterns unique to each of those states.

The point is that the revenue and expense issues of Powers operating only in Minnesota are inextricably Minnesota based - and so the Minnesota Court concluded:

> "[Powers] receives all of its income from sales at its stores [all in Minnesota]-i.e., it receives no income from other Associated Dry Goods divisions or subsidiaries."

See Petition, Appendix A, p. 8a.

Yet in spite of this conclusion the Minnesota Court found Powers to be unitary with other Associated divisions and justified the finding on the basis of *Container Corp.*, a case relating to a vertically integrated manufacturer, and *Butler Bros.*, a case relating to a vertically integrated wholesaler.

Petitioner urges that *Woolworth* be reasserted in a way to make clear that the necessary nexus of unitariness must relate to tax incidents and the factors which are the components of a tax result.

II.

A substantial federal question exists when constitutional standards are not scrupulously applied at the point of first contact of the citizen with the law.

Because petitioner files in some states, other than Minnesota, on an apportionment basis, where state law and the facts of petitioner's local operations may be different, respondent implies that it ill behooves petitioner to suggest that the State of Minnesota and its courts have ignored essential facts in determining that petitioner's income must be apportioned here as well. Respondent would thus turn the argument to considerations of "fairness," a tit-for-tat approach, regardless of fact and law. Indeed, the Minnesota Tax Court also interjects similar notions with its observation: "It seems unfair for a corporation . . . to obtain the most favorable tax treatment in each state." See Respondent's Brief in Opposition, pp. 12-13. Far from being "unfair," however, it is the legal right of petitioner, as well as its duty to its shareholders, to determine and assert its various tax liabilities in

every way most favorable to it. As Justice Frankfurter said in notable dicta:

> "As to the astuteness of taxpayers in ordering their affairs so as to minimize taxes, we have said that 'the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.' [Holmes, Justice] . . . This is so because 'nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions.' Learned Hand, Circuit Judge. . . ."

Atlantic Coast Line Railroad Co. v. *Phillips*, 332 U.S. 168, 172-73 (1947).

The State of Minnesota is a sovereign government entrusted with constitutional responsibilities, among which is the role of protector of the rights of its citizens, particularly, we suggest, at those points where such rights intercept with the state's own activities such as those it undertakes in its role of tax collector. True fairness requires an appreciation and understanding, at that juncture, that the State of Minnesota and its taxpayers do not stand on equal footing and that if the role of tax collector is given unrestrained sway, the taxpayer has no protection except through costly litigation. Petitioner therefore urges this Court to define the unitary concept with greater accuracy and make clear that unitariness, to be a rationally applicable concept, must be seen in terms of revenue and expense, and the sources thereof, and not in terms of such superficial aspects as the taxpayer's organizational or ownership circumstances.

The Minnesota Supreme Court concluded that all of Powers' revenues came from Minnesota, but nevertheless upheld the applicability of apportionment. Petitioner seeks a remedy from this anomaly and requests that either a writ be issued or that summary direction be given to the Minnesota Supreme Court to revise its decision in accordance with the *Woolworth* precedent.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the petition, the petitioner's request should be granted.

Respectively submitted,

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